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Order 2001-7-10



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 17th day of July, 2001

Served: July 17, 2001

2001 China Code-share Points Case

Docket OST-2001-10172 - /

Applications of

Northwest Airlines, Inc.
and
Air China International Corp.

Docket OST-2001-9183 - 10

Delta Air Lines, Inc.
and
China Southern Airlines Co. Ltd.

Docket OST-2001-9314 - 9

for exemptions pursuant to 49 USC §40109(c) and
statements of authorization pursuant to 14 CFR §212 to
engage in code-share services (U.S.-People's Republic of
China - 2001)

Application of

American Airlines, Inc.

Docket OST-2001-9424 - 8

for exemption under 49 USC §40109 (code-sharing with
China Eastern Airlines Corporation Limited)

Application of

China Eastern Airlines Corporation Limited

Docket OST-2001-9469 - 4

for exemption authority pursuant to 49 USC §40109 and a
statement of authorization pursuant to 14 CFR §212

ORDER

Summary

By this order, we (a) select the Chinese cities Wuhan, Fuzhou, and Guilin as three of the nine available Chinese points for use by U.S. carriers for code-share operations with their Chinese code-share partners; (b) grant the regulatory authorities necessary for the captioned U.S. and Chinese airlines to serve these points; (c) tentatively select the following four Chinese points as additional code-share points: Kunming, Changsha, Dalian, and Chongqing; and (d) tentatively decide that the remaining two points be selected by permitting American Airlines and Delta Air Lines to choose one additional code-share point each from those requested in their respective applications. We will afford interested parties 10 calendar days to comment on our tentative decision.

Background

The 1995 U.S.-China aviation agreement authorized code-sharing services between the airlines of the United States and China, initially for gateway-to-gateway services. Three U.S. carriers offer such services in the U.S.-China market: Northwest Airlines, Inc. with Air China International Corp., American Airlines, Inc. with China Eastern Airlines Corporation Limited, and Delta Air Lines, Inc. with China Southern Airlines Corp. Ltd. The 1999 U.S.-China Protocol expanded the available bilateral code-sharing opportunities to include code-share services to additional China points on a phased-in basis during the period April 1, 2000 through April 1, 2002. There are no limits on the number of U.S. carriers that can operate these code-share services, but the number of Chinese points is limited. Once the points are selected, however, all U.S. carriers with a Chinese carrier code-share partner can serve them. Effective April 1, 2000, through March 31, 2001, U.S. carriers could operate code-share services to a total of six points in China in addition to those served on gateway-to-gateway services. On September 15, 2000, the United States selected Chengdu, Nanjing, Qingdao, Shenyang, Xiamen, and Xian as the six additional code-share points. Effective April 1, 2001 through March 31, 2002, U.S. carriers can serve an additional nine Chinese points for their code-share services, and beginning April 1, 2002, U.S. carriers can serve an additional five points.

Applications

Each of the U.S./Chinese code-share partner relationships now serving China has submitted an application for the nine points available now for Chinese code-share services and has requested the regulatory authority necessary for operation of those services.¹ (See the attached chart for the list of points in the applications.²) Because of overlapping requests, we received collectively, requests to serve 16 cities. Answers and replies were filed by each of the U.S. carriers.³

¹ Northwest/Air China submitted a joint application whereby Northwest seeks an exemption and Air China seeks a Statement of Authorization to display Northwest's code on Air China's flights within China; Delta/China Southern submitted a joint application whereby Delta seeks an exemption and China Southern seeks a Statement of Authorization to display Delta's code on China Southern's flights within China. American submitted an exemption application, and China Eastern submitted a separate application, seeking exemption authority as well as a Statement of Authorization to display American's code on China Eastern's flights beyond Shanghai/Beijing to the additional Chinese points requested.

² Northwest/Air China submitted a joint application on March 15, 2001, but subsequently amended the points requested. See Reply of Northwest dated May 18, 2001, and Notice of Northwest and Air China, dated June 21, 2001, in Docket OST-2001-9183. The Notice included a motion for leave to file, which we will grant. The attached chart reflects the revised points requested by Northwest and Air China.

³ Some of the responsive pleadings were accompanied by motions for leave to file, which we will grant.

All of the applicants recognize that more points have been requested than are available for selection at this time. Delta and American maintain that to the extent that any carrier gets an advantage, such advantage should be to the newer entrants (American and Delta) since Northwest selected all of the first-year code-share points,⁴ has the most extensive code-share arrangement, and also serves China in its own right, an advantage not shared by American and Delta. To reach a solution, each applicant presents a method for selecting the nine points.

All three suggest that the three points that all three carriers have requested (Wuhan, Fuzhou, and Guilin) be selected. For the remaining six points, Northwest suggests that the selection be based on cities with the greatest population, arguing that the potential U.S. passenger and belly-cargo traffic is much greater in the markets that Northwest proposes to serve. Delta argues that population is not a reliable indicator of the demand for such service and suggests instead that the remaining six points be selected based on MIDT booking data,⁵ relying primarily on the number of U.S.-China passengers generated by the cities proposed for selection. As a compromise, however, Delta suggests that the six points be selected as follows: (a) select Kunming and Changsha since both Delta and American want those points and (b) permit American and Delta to choose two additional points each from the points requested in their original applications. Northwest argues, however, that MIDT data are also not reliable sources, as they may exclude bookings made in China in the Air China CAAC MIS system or U.S. point of sale bookings not made through travel agency CRS's, and may not fully or accurately reflect CRS bookings made in the United States for travel between U.S. points and interior points in China.

American takes issue with the proposals of Delta and Northwest and suggests that the points be selected in a manner that would meet each carrier's request for six of its requested nine points instead. American notes that under Delta's approach of listing carriers by the CRS market, two of the three cities resulting from Delta's approach are unique to Delta alone. American, therefore, would replace the city Haikou, the sixth ranked city on Delta's list by CRS market size, with Changsha, which is named both in Delta's and American's application. With respect to Northwest, American notes that under Northwest's proposal, Northwest's full request would be satisfied, whereas only five of the points sought by American would be selected and only four points requested by Delta would be selected.

Decision

We have decided to select, as a final action, the three points that are common to all applications, *i.e.*, Wuhan, Fuzhou, and Guilin, and to grant the applicant carriers the regulatory authority necessary to operate those services.⁶ We have tentatively decided (a) to select Dalian, Kunming, Changsha, and Chongqing as four additional points for U.S. carrier code-share services, (b) to select the remaining two points by permitting American and Delta to choose one additional point each from its original application for U.S. carrier code-share services, and (c) to grant the parties the regulatory authority necessary for the operation of services to the selected points. We propose to require American/China Eastern and Delta/China Southern to notify the Department and parties to this proceeding within 5 calendar days from the date of service of a final order in this case of the one additional point each has chosen. All parties will have ten calendar days from the date of service of this order to file comments on the Department's tentative decision.

⁴ Northwest was the only applicant for first-year code-share points.

⁵ MIDT data are marketing data derived from bookings made through all carrier computer reservations systems.

⁶ We will request the Department of State to forward the selection of Wuhan, Fuzhou, and Guilin as additional code-share points to the appropriate Chinese authorities.

The code-share only services available under the 1999 U.S.-China Protocol provide important opportunities to expand the range of U.S. carrier services available to consumers between the United States and China. We find it particularly important to maximize use of these opportunities given the overall restrictive nature of our aviation agreement with China. This means not only honoring the collective professional judgment of the applicant carriers to the extent possible, but also trying to ensure a degree of competition in an otherwise restricted environment.

In these circumstances, and given the overall service limitations in the market, we have decided, first, that the public interest clearly favors our selecting those three points that appeared in each carrier's application and that, furthermore, we should proceed now to award any authority needed to permit the immediate introduction of service. This honors each carrier's request and, because it ensures that all three carriers will be receiving authority for points that they contemplated serving, enhances the likelihood of competition. Given the noncontroversial nature of this aspect of our award, we saw no need not to proceed to final decision.

This still leaves, however, the question of how to best meet our above-stated goals as to the remaining six points to be selected. Here, we have tentatively concluded, taking into account that none of the remaining requested points appeared in all three applications,⁷ that the public interest would best be served if we selected all remaining points that would enhance the likelihood of competition given the stated interest in the point by more than one carrier. Four points fall into this category, Dalian, Kunming, Changsha, and Chongqing, which were selected by at least two of the three applicants, and we tentatively select them.

Two selections remain. Here, we propose to permit Delta and American to pick one additional point each from those requested in their applications. Northwest now holds one of the four designations to serve China and has significantly more service to China than Delta and American. Given these structural considerations, we believe that selection by American and Delta of these last two points will best promote competition in the market.

Under the selections set forth above, seven of the points requested in American's application, seven of the points in Delta's application, and six of the points in Northwest's application would be selected.

We recognize that the applicants in this case have offered alternative methods to select the nine points. As set forth in the record, we do not believe, however, that any of the alternatives offered better balances the concerns of all the parties or offers greater public benefits than the selections set forth in this order.

ACCORDINGLY,

1. We determine that the Chinese cities of Wuhan, Fuzhou, and Guilin should be selected as three additional code-share only points for U.S. carrier U.S.-China services;
2. We grant, subject to the attached conditions, American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and China Eastern Airlines Corporation Limited an

⁷ We note that American and Delta selected both Kunming and Changsha, but Northwest only would select one of those two points, not both.

exemption to engage in foreign scheduled air transportation of persons, property, and mail between the United States and Wuhan, Fuzhou, and Guilin, People's Republic of China;

3. We grant, subject to conditions, China Eastern Airlines Corporation Limited, Air China International Corp., and China Southern Airlines Company Limited Statements of Authorization to display their respective U.S. carrier code-share partners' codes on flights between their respective Chinese gateways and Wuhan, Fuzhou, and Guilin;
4. The exemption authority granted in ordering paragraph two is effective immediately and will remain in effect for a period of two years for American Airlines, Inc., Delta Air Lines, Inc. and Northwest Airlines, Inc., and for a period of one year for China Eastern Airlines Corporation;
5. The Statements of Authorization granted in ordering paragraph 3 are effective immediately and will remain in effect indefinitely, subject to the following conditions:
 - (a) The Statements of Authorization will remain in effect only as long as (i) American and China Eastern; Delta and China Southern; and Northwest and Air China continue to hold the necessary underlying authority to operate the code-share services at issue; and (ii) the code-share agreements providing for the code-share operations remain in effect.
 - (b) American and/or China Eastern, Delta and/or China Southern, or Northwest and/or Air China must promptly notify the Department (Office of International Aviation) if the code-share agreement providing for their respective code-share operations is no longer effective or if the carriers decide to cease operating all or a portion of the approved code-share services.⁸ (Such notice should be filed in the docket of respective applications of the carriers.)
 - (c) The code-sharing operations conducted under this authority must comply with 14 CFR 257 and any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in the computer reservations systems and elsewhere; that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code-share journey for all obligations established in its contract of carriage with the passenger; that the passenger liability of the operating carrier be unaffected; and that the operating carrier shall not permit the code of its U.S. code-sharing partner to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition.
 - (d) The authority granted here is specifically conditioned so that neither American nor China Eastern, neither Delta nor China Southern, and neither Northwest nor Air China shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions; and
 - (e) The authority granted here is further conditioned so that:
 - (i) neither American Airlines, Inc. nor China Eastern Airlines Corporation Limited shall give any force or effect to any exclusivity provision in their code-share agreement (Article 14 of the Codeshare Agreement dated December 17, 1997);

⁸ We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

and (ii) approval of the statement of authorization for Northwest Airlines, Inc. and Air China International Corp. precludes the carriers from exercising the exclusivity provisions (section 10) of the commercial cooperation agreement, dated May 12, 1998, to the extent that they would prevent Northwest and Air China from entering into cooperative service arrangements with U.S. and Chinese air carriers that have not been designated to provide combination services in the U.S.-China market;⁹

6. We may amend, modify or revoke the authority granted above without hearing at our discretion;
7. We grant all motions for leave to file otherwise unauthorized documents in the captioned dockets;
8. To the extent not granted above, we consolidate the balance of the applications in Dockets OST-2001-9183, OST-2001-9314, OST-2001-9424; and OST-2001-9469 into the *2001 China Code-share Points Case*, Docket OST-2001-10172;¹⁰
9. We tentatively decide that the cities of Dalian, Kunming, Changsha, and Chongqing should be selected as four additional points for U.S. carrier code-share services;
10. We propose to permit American Airlines, Inc. and Delta Air Lines, Inc. to select one additional Chinese city for U.S.-China code-share service from the points included in their respective applications, and we propose to require American and Delta to make that selection within five calendar days from the date of service of a final order in this case and to serve the Department and all parties to this proceeding with notification of the selection;
11. We direct any interested parties having objections to our tentative decisions set forth in this order and in ordering paragraphs 9 and 10 above to file their objections with the Department, Dockets in Docket OST-2001-10172, U.S. Department of Transportation, 400 Seventh Street SW, Room PL-401, Washington DC 20590, no later than ten days from the service date of this order; answers thereto shall be filed no later than five calendar days thereafter;¹¹
12. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action;¹²

⁹ We note that the code-share arrangement between Delta Air Lines, Inc. and China Southern Airlines Limited did not include provisions regarding exclusive dealings between code-share parties. Should the parties subsequently decide to amend their code-share agreement or any other agreement between them to include any provision relating to an exclusive arrangement between the parties regarding their code-share services, that amended language must first be submitted for consideration by the Department.

¹⁰ All pleadings concerning tentative selection of these code-share points should be filed in the new docket number assigned here and not in the individual carrier application dockets.

¹¹ The original submission is to be unbound and without tabs on 8½" x 11" white paper using dark ink (not green) to facilitate use of the Department's imaging system. In the alternative, filers may use the electronic submission capability available through the Dockets DMS Internet site (<http://dms.dot.gov>) by following instructions on the web site.

¹² As we are providing for the filing of objections to our tentative decisions and all applicants have stated in their pleadings that the three common cities should be made final now, we will not entertain petitions for reconsideration of this order.

13. If no objections are filed, we will deem all further procedural steps to have been waived, and will proceed to enter a final order; and
14. We will serve this order on American Airlines, Inc.; Delta Air Lines, Inc.; Northwest Airlines, Inc.; Air China International Corp.; China Eastern Airlines Corporation Limited; China Southern Airlines Company Limited; the Ambassador of the People's Republic of China in Washington DC; the Federal Aviation Administration; and the U.S. Department of State (Office of Aviation Negotiations).

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp

Attachment

REQUESTED POINTS

Northwest (OST-01-9183) and Air China International	Delta (OST-01-9314) and China Southern Airlines Company Limited	American (OST-01-9424) and China Eastern Airlines Corporation Limited (OST-01-9469)
Wuhan	Wuhan	Wuhan
Fuzhou	Fuzhou	Fuzhou
Guilin	Guilin	Guilin
Dalian		Dalian
Kunming or Changsa	Kunming	Kunming
	Changsha	Changsha
Chongqing	Chongqing	
Harbin		
Zhengzhou		
Changchun		
	Nanning	
	Haikou	
	Shantou	
		Nanchang
		Ningbo
		Shenzen

Attachment

U.S. CARRIER
Standard Exemption Conditions

In the conduct of operations authorized by the attached order, the applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with the applicable requirements of the Federal Aviation Administration Regulations, including all FAA requirements concerning security; and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.

FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:

(a) based on its operations in international air transportation that, according to the contract of

carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or

(b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

(8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;

(9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;

(10) If charter operations are authorized, comply (except as otherwise provided in the applicable bilateral agreement) with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and

(11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).

